Supreme Court, U.S.
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No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., ET AL.,

Petitioners,

v.

SHIRLEY MCQUILLAN, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.

INTRODUCTION

This memorandum is filed pursuant to Supreme Court Rule 15.7 to address Respondents' Reply Brief in Response to Brief for the United States as Amicus Curiae (hereinafter "Respondents' Reply"). For the reasons set forth below it is requested that this Court grant certiorari and summarily reverse to correct the three manifest errors in legal analysis identified by the United States in the Brief for the United States as Amicus Curiae (hereinafter "Amicus Curiae Brief"). Further, the verdict in this case cannot survive a remand to correct the errors identified by the United States.

II.

THE POINTS RAISED BY RESPONDENTS ARE IRRELEVANT OR INCORRECT ATTACKS ON THE AMICUS CURIAE ANALYSIS

1. Contrary to the statement in Respondents' Reply, p. 2, the presence of RICO and state law claims at the trial level is irrelevant to a determination by this Court whether summary reversal or plenary review is appropriate. The Ninth Circuit declined to address any issues in its opinion other than the antitrust issues which are the subject matter of this Petition.[1]

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[1] Respondents' attempt to advance an issue, *i.e.*, the resale price maintenance claim, that was not decided by the Ninth Circuit, is improper and also ignores the Petitioners' challenge below based on, *inter alia*, *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). The District Court

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2. The issue of antitrust injury goes to all grounds of antitrust liability considered below, and therefore a remand for reconsideration in the light of *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), will necessitate a new trial.

Contrary to Respondents' arguments, antitrust injury is a proper subject of a jury instruction on issues of fact.[2]

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refused to instruct the jury under *Sharp* that to find vertical price fixing, Respondents must show an agreement as to price levels between the manufacturer and the surviving distributors. This was impossible because the sole surviving athletic distributor, Spectrum Sports, was exonerated by the jury on the price fixing claim.

[2] *See Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1560 (11th Cir. 1990) (endorsing jury conclusion that plaintiff suffered a injury of the type the antitrust laws were intended to prevent); *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989) (court examines whether genuine issue of material fact present on antitrust injury element for purposes of summary judgment); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 n.2 (4th Cir.), *cert. denied*, 484 U.S. 823 (1987) (district court properly instructed the jury on its obligation to find an antitrust injury in order to return a verdict of liability); *Int'l Travel Arrangers v. NWA, Inc.*, 723 F. Supp. 141, 150 (D. Minn. 1989) (court determines that plaintiff "sufficiently alleged antitrust injury and has supported its claims with enough competent evidence to create issues of fact for a jury to decide"). Additionally, the model *Antitrust Civil Jury Instructions* propounded by the Antitrust Law Section of the American Bar Association similarly reflect that the issue is one for the jury's consideration. *See Antitrust Civil Jury Instructions* (1980), pp. S-49 through S-51 (1985 Supp.) (sample instructions). *Cf. Rebel Oil Co., Inc. v.*

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The United States observes that the trial evidence might justify a finding of antitrust injury under the *Atlantic Richfield* analysis. While that possibility exists, the refusal of the District Court to instruct on antitrust injury precluded any such finding and mandates reversal and retrial.

No decision was made by either the jury (as a factual matter) or the District Court (as a matter of law) as to the existence of antitrust injury so as to create a record that would have been subject to appellate review. The Ninth Circuit opinion does not fill this void and, as frequently stated by this Court, this Court will "not ordinarily address" an unresolved issue from the record below. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

3(a). Reversal and remand on *Copperweld* is appropriate. Contrary to the statement in Respondents' Reply Brief, p. 3, the evidence supported Petitioners' request for an instruction on a *Copperweld* defense and the instruction was not given.[3] *See* Amicus Curiae Brief, p. 8 n.7 and Ninth Circuit decision, Appendix A to Petition, p. 13 (Ninth Circuit found as a predicate for its decision that relevant entities were within same family). Additionally,

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Atlantic Richfield Co., 133 F.R.D. 41, 44-45 (D. Nev. 1990) (*Atlantic Richfield* leaves open the question whether antitrust injury is for jury or trial court).

[3] Respondents' observation that Petitioners presented no evidence on the relationship of the *Copperweld* affiliated entities is both irrelevant and inaccurate. Respondents themselves presented that evidence. *See* Amicus Curiae Brief, pp. 13-14.

the *Copperweld* instruction referenced in Respondents' Reply, p. 4, is incomplete. The complete *Copperweld* instruction below[4] confirms the error by the District Court in giving the instruction, and by the Ninth Circuit in affirming.

(b) Upon reversal and remand based on *Copperweld*, no Section 1 claim will survive. Contrary to the statement in Respondents' Reply, p. 6 n.2, the United States does not suggest that an illicit agreement existed between Petitioners and an unaffiliated distributor so as to support a Section 1 violation. In fact, the United States points out that the jury verdict suggests that "the jury thought the Sorbothane Petitioners had conspired with themselves." Amicus Curiae Brief, p. 14 n.11.[5] Furthermore, while the

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[4] A conspiracy between affiliated corporations may be found to exist unless the affiliated corporations are functioning as a single economic enterprise. The defendants have the burden of establishing that all members of the alleged conspiracy function as a single economic enterprise. To determine whether affiliated corporations function as a single economic enterprise, the jury must examine the particular facts of the case before it in accordance with various criteria. Among the criteria which may be examined when determining whether affiliated corporations function as a single economic enterprise are: (1) whether they have separate control of their day-to-day operations; (2) whether they hold themselves out as competitors; (3) whether they have separate officers; (4) whether they have separate corporate headquarters; and (5) whether they have common investors or owners. To find affiliated corporations to be a single economic enterprise, the jury must find a complete unity of interest between them.

[5] Respondents state that this is impossible because the *Copperweld* charge as given prohibited a finding of conspiracy

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United States notes that it was "possible" that an unaffiliated and unnamed potential conspirator could have been found by the jury to be a party to such an agreement, the United States also recognizes that the hypothetical conspirator, in fact, could not have been a Section 1 co-conspirator because it distributed medical products – products which were not functional substitutes for, and so were not competitive with, the athletic products sold by Respondents in the submarket as defined by Respondents and the District Court. Amicus Curiae Brief, p. 14 n.11.

4. Respondents apparently agree that *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), is not the law, but nevertheless argue that because of the diminished importance of the *Lessig* decision, in light of *Oahu Gas Serv., Inc. v. Pac. Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988), this Court should simply ignore the error in this case. Over Petitioners' objection, the District Court gave the erroneous *Lessig* charge and denied an *Oahu Gas* charge that pro-competitive intent, even when coupled with other motives, cannot result in liability. Record Transcript, p. 3915. The combined errors of *Lessig* and *Oahu Gas* were argued by Petitioners to the Ninth Circuit which, without discussion or analysis, applied *Lessig* in

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between a parent and its wholly-owned subsidiary, and then suggest that BTR was the direct parent of Sorbothane, Inc. and Hamilton-Kent. Respondents' Reply, p. 4. This suggestion is incorrect, as BTR was an indirect parent with an intermediate wholly-owned subsidiary, a fact stipulated to by Respondents in the District Court. Record Transcript, p. 4281.

an expansive way. *Lessig* was the law in this case, an error that can be cured only by reversal and remand to the District Court.

III.

CONCLUSION

The Petition for Certiorari should be granted or, for the reasons stated in the Brief of the United States, the decision of the Ninth Circuit should be summarily reversed.

Dated March 11, 1992.

Respectfully submitted,

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